UNITED STATES **ENVIRONMENTAL PROTECTION AGENCY**
WASHINGTON, D.C. 20460

AUG - 3 1999

OFFICE OF
AIR AND RADIATION

Honorable Thomas J. Bliley
House of Representatives
Washington, DC 205 15

Dear Chairman Bliley:

I am writing in response to your June 28, 1999 letter regarding the decision of the U.S. Court of Appeals for the District of Columbia Circuiton the July 1997 ozone and particulate matter ambient air quality standards (*American Trucking Association v. EPA, Nos. 97-1440,* 97-*144 1* (May *14,* 1999)). As you noted in your letter, the *ATA* decision raises important questions for public health and our air programs.

We strongly disagree with this decision and on June 28, 1999 filed a petition for rehearing requesting the entire D.C. Circuit to overturnthe panel's decision. We are particularly troubled by the split decision (2 to 1) that held that the Clean Air Act -- as applied in setting the new public health air quality standards for ozone and particulate matter -- is unconstitutional as an improper delegation of legislative authority to the Environmental Protection Agency (EPA). The *ATA* decision. a significant departure from well-established case law, carries with it dangerous implications for not only the new public health air quality standards, but also for many other federal laws or rules enacted to protect the health of the American people. In his dissent, Judge Tatel declared that "the court ignores the last half-century of Supreme Court nondelegation jurisprudence. apparently viewing these permissive precedents as mere exceptions to the rule laid down 64 years ago [in a 1935 case] ."

We continue to believe that the July *1997* ozone and particulate matter standards are necessary to protect public health, and nothing in the decision undercuts that belief. Despite the arguments made by industry. the Court did not question the science on which EPA relied to develop the health standards.

Although we disagree with the Court's ruling, we do respect that it is a decision of the D.C. Circuit and we are taking actions that are consistent with the decision. Since the *ATA* decision was handed down, we have been evaluating the decision and our programs to determine what impacts the decision has on those programs. We have briefed members of your staff and others on the Hill. representatives of State and local governments, and other interested parties -- both to seek input on the difficult issues we face as a result of this decision and to describe how we are addressing those issues once we have acted. I welcome this opportunity to continue our communications on these issues.

Enclosed are responses to the specific questions raised in your letter. In providing this material EPA is in no way prejudging the outcome of the judicial proceedings or any consequent administrative proceedings. We are still evaluating the impact of the Court's decisions on our programs as well as awaiting the Court's ruling on our petition for rehearing of the A *TA* decision. Therefore, future actions taken by EPA to implement the ozone and particulate matter air quality standards may differ from what are described in the enclosure.

I appreciate the opportunity to be of service to you and trust that this information is helpful.

Sincerely yours,

Robert D. Brenner (for)

Robert Perciasepe
Assistant Administrator

Enclosures

Responses to Questions Related to 5/14/99 U.S. Court of Appeals Ruling

Question (l)(a): In Part III of the decision, the Court of Appeals panel unanimously held that "EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." Please identify each specific step that EPA will take in the interim to "secure the protections" of the remanded .08 ppm ozone standard. For each step, please specify the relevant statutory authority, the timeframe under which these steps will be taken, whether EPA will require SIP revisions for any step, and the amount of reduction in ozone each step will provide in areas affected by the steps taken.

Response: The EPA is currently proceeding with the following activities related to the S-hour standard which EPA does not believe constitute enforcement of that standard: continuing the requirement that States monitor ambient levels of ozone, moving forward to designate areas as meeting or not meeting the 8-hour standard. and revising the Pollutant Standard Index (now the Air Quality Index) to include reporting on 8-hour concentrations of ozone. While the meaning and scope of the panel's decision concerning enforcement of a revised primary ozone standard is unclear and the mandate has not yet been issued, under any reading of the decision EPA does not believe that it is taking steps contrary to its terms. In addition, in taking these steps, EPA is in no way prejudging the outcome of the judicial proceedings or any consequent administrative proceedings.

In general, the ambient air quality monitoring performed for the l-hour standard is sufficient for purposes of monitoring for the S-hour standard. For purposes of the 1 -hour standard. the monitoring data is evaluated in l-hour increments and for purposes of the S-hour standard, the data is averaged over S-hour periods of time. Because the monitoring process is not substantively different. States should not need to revise their SIPs based on the promulgation of the S-hour standard. EPA's monitoring regulations, developed pursuant to section 3 19 of the Clean Air Act, are in 40 CFR parts 51 and 58.

Two other programs are currently moving forward to inform the public about the air quality in their area. First, as explained in response to question 5, below, the Court specifically held that EPA is required to designate areas as meeting or not meeting the 8-hour standard and EPA is proceeding with that process in accordance with the Transportation Equity Act for the 21st Century and section 107 of the CAA.

Second. on July 23, 1999, the Administrator signed final regulations revising the Pollutant Standard Index (40 CFR part 58) and renaming it the Air Quality Index ("AQI"). As discussed more fully in response to question 5.b.. EPA concluded that proceeding with these revisions is consistent with the court's decision. Required by section 3 19 of the Clean Air Act, the AQI is an important mechanism for letting citizens know about the air quality in their area on specific days of the year and how this air quality might affect their health. It does not implement

the **NAAQS** and it places no burden on sources to reduce emissions. Rather, it is a tool that allows the public and industry to make informed choices regarding their activities on days when pollution levels are high. Some States may have SIP provisions related to the predecessor Pollutant Standard Index and may need or want to revise their SIPs to reflect the recent revisions.

Question (l)(b): The Court also struck down the .08 ppm ozone standard because it concluded that **EPA** had illegally refused to consider possible increased public health risks associated with **UVB** radiation. Please explain how taking interim steps associated with the .08 ppm standard is consistent with this part of the Court of Appeal's decision. Please explain how you know that such action will further the public health in light of your statements to the Court that you have no authority to consider potential public health disbenefits.

Response: The D.C. Circuit panel did not vacate the 8-hour ozone standard. Rather it explicitly left the standard in place, remanding certain aspects of the standard-setting decision to EPA for further proceedings. In so doing, the court did not question the science on which EPA relied in determining that the 8-hour standard is necessary to protect the public from adverse effects of public health significance, and which demonstrates that the public is at increased risk of adverse health effects when ozone levels exceed the 8-hour standard. We disagree with the court's ruling regarding consideration of the beneficial effects of air pollution. In our petition for rehearing and rehearing en *banc* with the D.C. Circuit, filed on June 28, 1999, we have restated our view that it is inappropriate to consider maintaining levels of ozone pollution that are harmful to public health as a shield against naturally occurring UV radiation from the sun. We continue to believe that the 8-hour standard we promulgated in 1997 is needed to protect against the harmful effects of breathing ozone pollution. Further, we believe that it is inconsistent with the Clean Air Act to conclude that the Agency in setting NAAQS must consider ozone pollutions alleged ability to address the risk posed by a natural phenomenon. i.e, UV radiation emitted by the sun. Pending the outcome of any further judicial review, continuing the collection and analysis of air quality data, identifying areas which violate the 8-hour standard, and informing the public about the presence of high ozone concentrations through the Air Quality Index are all consistent with the panel's opinion. These actions provide citizens with important information which they need to be able to take appropriate actions to protect themselves from ozone's adverse health effects (for example, by minimizing exercise activity outdoors on high ozone days).

Question (l)(c): In Part IV of the decision? the Court of Appeals unanimously vacated the revised coarse particulate matter standard and invited briefing on a remedy applicable to the fine particulate matter standard. Please identify each specific step that EPA will take to "secure the protections" of the revised coarse and the fine particulate matter standard. For each step, please identify the relevant statutory authority, the time frame under which these steps will be taken, whether EPA will require SIP revisions for any step, and the amount of reduction in coarse and fine particulate matter that each step will provide in areas affected by the steps taken.

Question (l)(d): In a supplemental brief filed on June 15th, EPA argues that "the PM2.5 standards cannot currently form the basis for controlling emissions from any individual sources of air pollution." What interim steps to "secure the protections" associated with this standard do you anticipate taking given your representation to the Court in the June 15th brief?

Response: On June 15th, EPA filed a supplemental brief outlining the Agency's recommendations on whether or not to vacate the PM2.5 standards. In that brief EPA 1) recommended that the court not vacate the NAAQS for fine particulate matter; 2) noted that in the preamble to the July 18, 1997 final rule, EPA explained that to ensure the protection of public health during the transition'to implementation of the revised PM standards. the 1987 PM IO standards would be retained for an interim period until certain criteria were met [40 CFR 50.6(d)]; and 3) outlined current activities with regard to the new PM2.5 standards. On June 18, after reviewing the supplemental briefing, the court of appeals ordered that the fine particulate standards not be vacated at this time.

As discussed in the June 15th brief, although the fine particle standards technically became effective on September 16, 1997, they cannot serve as a basis to limit air pollution from any individual source until several steps have been taken by EPA and the States. Consistent with the July 18, **1997** Presidential memorandum, EPA will proceed with requiring States to submit SIPs in July 2000 addressing those section 110(a) requirements which establish adequate resources and legal authority for States to proceed with developing the infrastructure for their PM2.5 program. During this interim period, States should proceed with developing the infrastructure for their PM2.5 program by completing the deployment of the PM2.5 monitoring network, collecting and analyzing PM2.5 data, and developing emission inventories. The President's strategy does not provide for implementation of the PM2.5 standards until after the 2002 PM NAAQS review is completed. In taking these steps, EPA is in no way prejudging the outcome of the judicial proceedings or any consequent administrative proceedings.

In addition, EPA's revision of the Pollutant Standard Index under section 3 19 of the Act (see response to question 1 .a. above) includes establishing a new subindex for reporting of 24-hour PM2.5 concentrations, in addition to the PM 10 concentrations already included in the existing Index. As discussed more fully in the responses to questions 1 .a. and 5.b., EPA concluded that proceeding with these revisions is consistent with the court's decision. Again, some States may have SIP provisions regarding the predecessor Index? and States may need or want to revise their SIPs to reflect the recent revisions.

Question (2)(a): What specific actions will EPA undertake to review or reconsider the ozone and particulate matter standards pursuant to the Courts remand of the standards?

Question (2)(b): What is the schedule for any actions EPA will undertake to review or reconsider the standards pursuant to the Court's remand of the standards?

Question (2)(c): Please identify any differences between the actions EPA will undertake pursuant to the remand of the standards versus the Agency's obligations to undertake a 5 year review of the ozone and particulate matter standards under section 109(d)(1) of the Clean Air Act.

Question (2)(d): Please identify any actions EPA has taken, or plans to take, to develop a "constitutional construction" of the Clean Air Act or "intelligible principles" in accordance with the Court of Appeals decision.

Response: EPA believes the panel erred in holding that Clean Air Act section 109, as interpreted by EPA, effects an unconstitutional delegation of legislative authority. On June 28, 1999, EPA filed a petition for rehearing and rehearing en *banc* seeking review of the panel's decision. As EPA explained in its petition, both the Clean Air Act itself, and EPA's interpretation of it, provide "intelligible principles" fully sufficient to satisfy the nondelegation doctrine and to ensure that EPA has appropriately executed the will of Congress. In accordance with the Court's July 1, 1999 order, other parties responded to EPA's petition for rehearing on July 20, 1999. EPA will wait for the court's decision on EPA's petition for rehearing before taking further action to respond to the Court's opinion.

Question (2)(e): The Court of Appeals decision additionally states that, "Alternatively, if EPA concludes that there is no principle available, it can so report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice." Please describe any and all actions taken by EPA to date with reference to this portion of the Court of Appeals decision. Was any consideration given to this course of action before EPA declared, on the same day as the Court of Appeal's decision that it intended to recommend an appeal to the Department of Justice? If so. please describe the content and context of this consideration.

Response: See response to questions (2)(a) **-** (2)(d) above. Since EPA believes the panel erred. and has petitioned for rehearing, no legislative action is being considered at this time.

Question (3)(a): What actions does EPA currently contemplate taking with respect to previous revocations of the 0.12 ppm standard?

Response: The EPA is still considering what actions should be taken in this regard. The EPA is consulting representatives of areas that may be affected by actions on the determinations that the l-hour standard no longer applies. and other interested persons, to get their views.

Question (3)(b): If EPA decides to take action concerning some or all of the revocations, what procedures do vou believe the Agency would need to undertake? In what timeframe would such procedures be undertaken?

Response: No timeline can be constructed until decisions are made concerning what actions should be taken. If EPA decides to reinstate the l-hour standard, EPA would comply with notice and comment rulemaking requirements.

Question (3)(c): According to the final rule addressing revocation of the 0.12 ppm ozone standard in certain areas (63 Fed.Reg. 3 IO 14) the EPA intended to publish yearly updates on revocation of this standard in other areas. Has the status of any contemplated or pending notices to revoke the 1 hour standard been affected in any way by the court decision? If so, how?

Response: On May 12, 1999 the Administrator signed a proposal identifying seven more areas where the l-hour standard would no longer apply, based on EPA's determination that the areas had attained that standard, using air quality data available from 1996-1998. This proposal was published on June 9, 1999 (64 FR 30937). The comment period for this proposed rule ended on July 9, 1999. The decision regarding future action to finalize this proposal is dependent upon the Agency's final decision as to whether or not to reinstate the l-hour standard in areas where EPA has previously determined, or EPA has proposed to determine, that it is no longer applicable.

Question (3)(d): What ozone standard is in place for those areas where EPA revoked the 1 hour, 0.12 ppm standard given the Court of Appeal's determination that the 8 hour, 0.08 ppm standard is unenforceable? Is any ozone standard currently in place for those areas?

Response: The 8 hour, 0.08 ppm standard remains in place. It has not been vacated by the court decision.

Question (4)(a): The stay in the SIP call has indefinitely delayed the date on which States will be required to submit SIP's. What is EPA's current assessment of the impact of this delay in a SIP on the subsequent requirement that controls be in place to achieve NOx reductions'? In your answer, please specifically address whether the Agency believes that the 43 month period established in the October 1998 SIP call between the SIP submission deadline and the actual imposition of controls by affected sources must be retained. If the Agency believes that this period need not or should not be retained. what period of time does the Agency consider to be sufficient between the submission of state SIPs and the imposition of controls?

Response: In the October 1998 SIP call. EPA made two decisions relevant to this question. First, EPA decided that 12 months was adequate time for States to prepare their SIPs for submission by September 30, 1999. Second, EPA decided that NOx controls must be implemented by May 1, 2003. The latter decision was based on EPA's technical analysis showing that if States elected to impose the control levels assumed by EPA for large electric generating units (EGUs) and non-EGUs, those sources would be able to meet the required levels

by May 1, 2003 - near the start of the 2003 ozone season - if the sources were informed of the applicable requirements by April 2000. EPA never decided that 43 months from the date of SIP submission to the date of implementation was necessary. At this time, the SIP submission deadline is stayed by the D.C. Circuit, pending further order of the Court. Because EPA does not know when the D.C. Circuit may lift that stay, or under what circumstances, it is not possible at this time to predict what effect the Court's action may have on the May 1, 2003 deadline for imposition of NOx controls. EPA will evaluate the impact of the Court's action once the stay is lifted.

Question (4)(b)(i): Please confirm whether or not EPA believes States are required to submit nonattainment designations for areas based on the remanded .08 ppm ozone standard.

Response: In its May 14, 1999 opinion the Court specifically ruled: "... we hold that the EPA retains the power to designate areas as nonattainment under a revised ozone NAAQS." Slip op. at 32. Nothing in the opinion disturbs the obligation of the States under the CAA and TEA-21 to submit proposed area designations. On June 25, 1999, John Seitz, Director of EPA's Office of Air Quality Planning and Standards, issued a guidance memorandum to the EPA Deputy Regional Administrators. A copy is attached. The memo instructs the Regions to work with their States to ensure that the States submit their most recent ozone air quality monitoring data by August 15, identify the monitors where exceedances of the 8-hour standard have occurred, and work with their States to assess nonattainment area boundaries. The memo also says that EPA will advise States in late winter or early spring of EPA's plans for proposing and finalizing designations. States will then have an opportunity to submit any additional information regarding their designation recommendations and boundary determinations.

Question **(4)(b)(ii):** What are EPA's current plans with respect to the classification of areas under the .08 ppm ozone standard pursuant to section 172 of the Clean Air Act?

Question **(4)(b)(iii):** What effect does EPA believe the court opinion has on its ability to classify any area as *'transitional"?

Response: Prior to the court's decision in ATA, EPA was planning to classify areas for the 8-hour 0.08 ppm ozone standard under section 172(a)(1). which is located in subpart 1 of part D of title I of the Clean Air Act. In ATA, however, the court held that "Subpart 2, not Subpart 1, provides the classifications and attainment dates for any areas designated nonattainment under a revised primary ozone NAAQS." Consequently, EPA will await the outcome of the Court's action on its rehearing petitions prior to determining how to classify areas for the 8-hour standard.

Subpart 2 establishes five specific classifications, none of which is analogous to the transitional classification that EPA had planned on establishing for certain areas designated

nonattainment for the 0.08 ppm ozone NAAQS. EPA has sought rehearing of this portion of the court's decision; unless that opinion is vacated or modified, EPA could not provide the transitional classification for areas designated nonattainment for the 0.08 ppm ozone NAAQS.

Question (4)(c): I understand that one or more states may be contemplating filing SIPs with EPA even in the wake of the stay issued by the Court of Appeals for the District of Columbia Circuit on May 25th. How does EPA plan to respond in the event that a State submits a SIP in response to the October 1998 NOx SIP call? What action does EPA plan to take if it finds that a SIP does not conform with its October 1998 NOx SIP call?

Response: Under the Clean Air Act, EPA has 14 to 18 months to act on a SIP submission. First, EPA must evaluate the submission to determine within 60 days whether it is complete. If EPA does not affirmatively find the submission complete or incomplete, then it is deemed complete six months after it was submitted. CAA 11 O(k)(1). Within 12 months of the time EPA finds a SIP complete or it is deemed complete, EPA is required to approve or disapprove the submission. CAA 110(k)(2). In the SIP call litigation (State of Michigan v. EPA (D.C. Cir. No. 98-1497)), the court stayed the requirement that States must submit SIPs in response to the NOx SIP call by September 30, 1999. This stay did not affect the substance of the rule, including EPA's determination of what is necessary to address "significant contribution" under section 110(a)(2)(D) of the Act. Thus, pending the ultimate outcome of the litigation, if a State submits a SIP in response to the NOx SIP call, EPA will evaluate that submission in light of the substantive requirements of the NOx SIP call rule. If a SIP does not conform to the requirements of the NOx SIP call rule, EPA would not be able to approve the submission as meeting section 110(a)(2)(D) of the Act. However, since the court has stayed the requirement that States submit such plans. any disapproval of a submission during the pendency of the stay would not trigger sanctions under section 179(a) or an obligation for EPA to promulgate a federal implementation plan (FIP) under section 110(c).

Question (5)(a): Please itemize and describe any actions or obligations under the Clean Air Act relating to the .08 ppm ozone standard which EPA considers to be inconsistent with the court's ruling.

Question (5)(b): Please itemize and describe any actions or obligations under the Clean Air Act relating to the .08 ppm ozone standard which EPA does not consider to constitute "enforcement" of the standard or otherwise to be in contravention of the Court of Appeals opinion.

Response: The court's opinion is clear with respect to several requirements under the Clean Air Act. First. the court specifically held that EPA is required to designate areas for the 0.08 ppm ozone NAAQS. Therefore, EPA plans to move forward to designate areas in accordance with the Clean Air Act and the Transportation Equity Act for the 21st Century. In addition, as noted in response to question 4.b.ii and iii, above, the court specifically held that EPA does not have

authority to classify areas and set attainment dates under subpart 1 of part D of title I of the Act.

Because the court did not analyze related provisions of the Act, other than those relating to classifications and attainment dates (Sections 172(a)(1) and (2) and 18 1), it is unclear what impact the Panel's broad conclusion has on other actions or obligations relating to the S-hour ozone standard. In light of the lack of clarity in the court's opinion and EPA's filing of a petition for rehearing, EPA has proposed not to rely on the 8-hour standard as a basis for imposing obligations under section 126 at this time because such action "could be construed as inconsistent with the court's ruling." (64 FR 33964 (June 24, 1999)) (Emphasis added.) As reflected in the response to question (l)(a), however, EPA concluded that it was appropriate to proceed with final action on proposed revisions to the Pollutant Standard Index (to be renamed the Air Quality Index) under section 3 19 of the Act, which in part reflect the expanded understanding of air quality-health relationships that resulted from EPA's review of the scientific data underlying its decisions on the NAAQS for ozone and particulate matter. Nothing in the Court's opinion alters the conclusions EPA reached concerning those relationships, and the Index has no bearing on pollution control requirements for specific sources. The function it serves of conveying to the public information on daily air quality and associated health risks, however, is clearly important, especially in this season of higher pollution levels. For these and other reasons, EPA saw no reason to delay final action on the proposed revisions. EPA will continue to assess other actions and obligations on a case-by-case basis, as they arise, to determine the appropriate course of action in light of the court's opinion.

Question (6)(a): Please explain what elements of the May 14th Court of Appeals decision or the May 25th partial stay of submission of revised State Implementation Plans affect the schedule for *compliance* with the NOx SIP call. What has EPA determined, to date, is the extent of any effect of these decisions on the schedule for compliance?

Response: The May 25th partial stay of submission of revised State Implementation Plans (SIP s) affected the schedule for States to comply with the NOx SIP call through submission of SIP revisions by staying the deadlines for States to submit such SIP revisions, which EPA had established in the NOx SIP call rule. EPA has made no determination to date regarding the effect of the court decisions you cite on the schedule for compliance. Such a determination will depend in part upon the outcome of the litigation on the NOx SIP call rule.

Question (6)(b)(i): Please indicate what elements of the May 14th Court of Appeals decision or the May 25th partial stay of submission of revised State Implementation Plans require EPA to "delink" the NOx SIP call and the section 126 petition process.

Response: In its June 24th proposal to indefinitely stay the trigger mechanism in EPA's April 30 rulemaking for section 126, EPA explained that in light of the court's May 25th decision staying the compliance schedule for States to submit SIPs in response to the NOx SIP call, EPA believes

it is no longer appropriate to link its findings under section 126 to the compliance schedule for the NOx SIP call by deferring making final findings under section 126 as long as States and EPA were meeting a schedule for action set forth in the NOx SIP call.

EPA's initial approach of deferring action on the section 126 petitions was not explicitly contemplated by the statutory language of section 126 or section 110. However, EPA believed that its initial approach "linking" actions under the two sections was a reasonable way to address the requirement to act on the section 126 petitions in the same general timeframe as that in which States were required to comply with the NOx SIP call, where there was an "explicit and expeditious schedule for states to meet their section 110(a)(2)(D)(i) obligations" under the NOx SIP call, and where meeting such obligations would satisfy the requirements of section 126. See 64 FR 28275. EPA did not interpret the interplay of sections 110 and 126 to require EPA to afford States "the opportunity to revise their SIPs in response to any deficiencies identified through the section 126 petition process," as is suggested above. Rather, EPA interpreted the sections in the following manner:

> "EPA believes that the best interpretation of section 126 is that it authorizes a downwind state to petition EPA to control emissions from upwind sources where the upwind SIP is inadequate to comply with the requirements of section 110(a)(2)(D)(i), but that where the SIP establishes adequate controls on interstate transport and a source is violating those requirements, the appropriate remedies are provided in section 113 and 304 of the Act, not section 126." 64 FR 28272.

Applying this interpretation in the context of the NOx SIP call, EPA stated, "if a state had already adopted a SIP revision in response to the NOx SIP call providing for sources to reduce their emissions at a future date and EPA had approved the revision as adequate to meet the requirements of section 110(a)(2)(D)(i), EPA would not find that a source in that state was emitting in violation of the prohibition of section 110(a)(2)(D)(i)." 64 FR 28274. See also 64 FR 28274 footnote 15. This interpretation of section 126 addresses the situation where a State has already adopted and EPA has already approved an adequate SIP revision before EPA acts on a petition under section 126.

EPA next attempted to develop a reasonable approach to acting on petitions under section 126 in the circumstances present at the time of the April 30 rule, where States had not yet adopted SIP revisions to comply with the NOx SIP call, but were under a requirement and schedule to do so shortly. In the April 30 rule and the NOx SIP call EPA was operating on basically the same set of facts regarding the same pollutants and largely the same amounts of upwind reductions affecting the same downwind States. In addition, under the NOx SIP call, the upwind States were under an "explicit and expeditious schedule" to meet their section 110(a)(2)(D)(i) obligations. and meeting such obligations would satisfy the requirements of section 126, including the requirement that sources come into compliance with the section 110(a)(2)(D)(i) requirements "as expeditiously as practicable." Under these circumstances, EPA believed it could justify briefly deferring final action on the section 126 petitions. As stated in the April 30 rule, "EPA's interpretation provides states and EPA a reasonable opportunity to

address the interstate transport problem through approved SIP revisions, but ensures that the opportunity is not open-ended. Instead, EPA interprets the interplay of the two provisions to ensure that under one approach or the other, reductions will be achieved as expeditiously as practicable." 64 FR 28277.

The court's May 25th decision stays the compliance schedule for States to respond to the NOx SIP call, so there is no longer an "explicit and expeditious schedule for states to meet their section 110(a)(2)(D)(i) obligations" under the NOx SIP call. See 64 FR 28275. As a consequence, there is also no longer certainty that the NOx SIP call will lead to emissions reductions "as expeditiously as practicable," which would be by May 1, 2003. These factors were necessary to EPA's initial approach of deferring final action under section 126. Now, in the absence of these factors, EPA believes that it is no longer appropriate to defer action under section 126. Please refer to EPA's June 24, 1999 Notice of Proposed Rulemaking for further discussion of the basis for EPA's proposal to remove the linkage between State actions under the NOx SIP call and EPA's findings under section 126. 64 FR 33964-33965.

Question (6)(b)(ii): Please indicate what latitude States will be allowed to select sources for the control of NOx emissions or to vary the control requirements on any source under EPA's proposal to grant section 126 petitions. Please indicate what latitude States will be allowed to propose alternative plans to reduce NOx emissions within their state. Please address the effect on these issues of EPA's determination and statements to the Court of Appeals that sources need at least 3 years lead time for compliance.

Response: Under the NOx SIP call. States are required to reduce a certain quantity of emissions by May 1. **2003.** but have complete latitude to select how to achieve the required emissions reductions. The April 30 rule acting on the section 126 petitions provided that after a section 126 finding has been made with respect to a particular source or group of sources, the finding will be deemed to be withdrawn. and the corresponding part of the relevant petitions denied, if EPA approves a SIP revision (or promulgates a FIP) for the relevant State that complies with the NOx SIP call. EPA has not proposed to change this provision. Thus, States retain the ability to supplant the federal remedy under section 126 with similar or different State measures to reduce interstate transport so long as those measures are adequate to achieve the reductions required under the NOx SIP call rule including using the compliance date of May 1, 2003 for any sources covered by the section 126 rule that the State chooses to regulate (Section 126(c) limits the compliance period for such sources to three years from the date of the finding under section 126(b)). EPA's April 30 rule under section 126 provided affected sources adequate lead time and the stay of the NOx SIP call SIP submittal deadline does not provide a basis for a State to grant those sources additional time.

Question (6)(b)(iii): Please provide the Committee with an estimate of the differential in control costs associated with sources covered by section 126 petitions addressing the 0.12 ppm 1 hour

standard versus the control costs on these same sources under the EPA's previous proposal to link section 126 petitions with the NOx SIP call.

Response: To clarify, the requirements for sources contributing to nonattainment problems based on the 0.12 ppm 1 -hour standard would be the same, whether EPA makes the findings on the petitions identifying such sources under the automatic trigger provisions of the April 30, 1999 rule or in a final rule based on the June 24, 1999 proposal. A related question is whether there would be a change in control costs resulting from the proposed interim stay of the section 126 findings for sources based on the 8-hour standard. The EPA has proposed to implement a NOx cap-and-trade program for sources that would be affected by findings under section 126. The April 30, 1999 section 126 rule covered sources in 19 States and the District of Columbia, based on the l-hour and 8-hour ozone standards. The EPA estimated that the cost-effectiveness for a NOx trading program covering these 20 jurisdictions would be about $1,470 per ton of NOx removed for both electric generating units and large industrial boilers and turbines. The EPA does not anticipate that the cost-effectiveness numbers will change significantly when only the sources covered based on the 1 -hour standard are included in the section 126 action because many of the factors which affect costs will not change.

Question (7)(a): Please indicate your rationale for allowing such a limited public comment period on a proposal which makes substantial alterations in a final rule. Since actual controls are not required to be installed until May 2003, please explain why a more lengthy public comment period cannot be accommodated at the front end of the process to substantially restructure the May 25th final rule.

Response: The public comment period on the June 24 proposal is 46 days, which is a fairly standard period of time for public comment on a proposal of this nature. While the changes proposed are critical to the scope and structure of the final rule, they do not require reanalysis of every aspect of the underlying rule. Moreover, EPA expects that the entities with an interest in, and hence likely to comment on, this proposal will have already commented, in many cases extensively, on the underlying rule. Thus, commenters are likely to be very familiar with the legal and technical background for EPA's proposal. Moreover, sources that would be subject to controls have generally indicated that they desire certainty regarding emissions control obligations as soon as possible and would prefer as much leadtime as possible for adopting controls. The period provided for public comment avoids unnecessary delay of this rulemaking and thereby maximizes leadtime for sources without jeopardizing air quality benefits.

Question (7)(b): I note EPA is not reopening the entire April 30th Notice of Final Rulemaking for comment and reconsideration. Please indicate your rationale for not allowing broader comments to be made on a proposal which acts to restructure the rationale for the NOx SIP call, changes the number of States affected by the SIP call, and substantially alters the sources and emissions subject to the SIP call.

Response: First, to clarify, the June 24 proposal does not affect the rationale for, the number of States affected by, or the sources and emissions subject to the NOx SIP call. Rather? the June 24 proposal proposes changes to the April 30, 1999 rule under section 126, not the October 27, 1998 NOx SIP call under section 110(a)(2)(D)(i).

Second, EPA has solicited comment on the specific changes it is proposing to make to the April 30 rule. To the extent that a commenter believes that a proposed change would affect other aspects of the April 30 rule, a comment regarding such effects would be within the scope of the solicitation for public comment. To the extent that a comment would revisit an aspect of the April 30 rule that is unaffected by the proposed changes, the public has already had an opportunity to comment on that aspect of the rule and EPA has already resolved that issue in light of the public comments previously received. EPA sees little benefit to reopening all such previously considered aspects of the final rule to additional comment, and such an approach could cause substantial delays in completion of the section 126 rulemaking. Thus, EPA has only reopened for comment the elements of the April 30 rule that it is proposing to change.

Question (7)(c): How did EPA determine it was "highly unlikely" that most States would submit SIP revisions for the NOx SIP call in time to propose approval by November 30, 1999? How many States did EPA determine would not submit timely revisions in time for EPA to act by November 30, 1999?

Response: Because of the May 25, 1999 court order staying the deadline for States to submit SIPs in response to the NOx SIP call, there is no longer a schedule for compliance with the NOx SIP call. and States are no longer required to submit their NOx SIPs by September 30, 1999, which was the deadline established in the final NOx SIP call. For EPA to be able to propose approval of the NOx SIPs by November 30, 1999, States would need to submit their SIPs by September 30, 1999. See Response to Significant Comments on the Proposed Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, April 1999. The EPA reasoned that in the absence of a deadline for States to submit SIP revisions under the NOx SIP call, and because the NOx SIP call litigation is still ongoing. it would be unlikely that most States subject to the NOx SIP call would choose to submit SIP revisions by September 30, 1999. However, EPA is aware that on June 16, 1999, the States in the Ozone Transport Region approved a resolution stating that they expect to complete their NOx SIP regulations by September 30, 1999. This represents 9 of the 23 total jurisdictions covered by the SIP call.

Question (8)(a): Please provide me with your current assessment as to the impact of the May 14th Court of Appeals decision on the regional haze rule. In particular, if following resolution of the status of the PM2.5 standard EPA proceeds with a PM2.5 rule, please indicate how the Agency will ensure coordination of the regional haze SIPs with PM2.5 SIPs as required by the TEA-2 1 legislation.

Response: EPA is proceeding with its plans to complete a review of the PM 2.5 standards by 2002, to complete deployment of the PM2.5 monitoring network to characterize ambient air quality, and to provide funding to the States to establish regional planning partnerships for coordinating the development of policy and technical analyses for PM2.5 and regional haze. Assuming that PM2.5 standards remain in effect upon completion of the Agency's review of the standards in 2002, EPA and the States will have the necessary PM2.5 monitoring data for designating attainment and nonattainment areas in the 2002-2004 time frame. Control Strategy SIPs for regional haze are due in the 2004-2008 time period which encompasses the period that control strategy SIPs would be due for PM2.5 nonattainment areas. EPA believes that by taking these steps, the Agency will be able to ensure coordination of PM2.5 and regional haze SIPs as discussed in the preamble to the regional haze rule. States will also be working on regional planning activities to address the regional haze program. Many of the activities and analyses done in support of regional planning for regional haze will overlap with implementation of the PM2.5 standards thereby allowing coordination of these efforts.

Question (S)(b): Please indicate whether you believe that SIP submission requirements under the regional haze rule will be affected by the time necessary to pursue legal options available to the EPA before the full Court of Appeals. Do you believe that this assessment would change if EPA sought reconsideration of all or any part of the May 14th Court of Appeals decision in the Supreme Court?

Response: We do not believe that SIP submission requirements under the regional haze rule will be affected by the time necessary to pursue legal options available to the EPA before the full Court of Appeals or the Supreme Court. EPA believes there is adequate time available to pursue legal options and to meet regional haze SIP submission requirements. As noted in the response to question 8(a) above, assuming that PM2.5 standards remain in effect upon completion of the appeals process and the Agency's review of the standards in 2002, EPA and the States will have available the necessary PM2.5 monitoring data for designating attainment and nonattainment areas in the 2002-2004 time frame. Control strategy SIPs for nonattainment areas are due 3 years after designations. The regional haze rule allows States to engage in regional planning and submit their control strategy SIPs on the same time frame as their PM 2.5 SIPs which could be as late as 2007 or 2008, depending on when EPA completes its PM 2.5 designations. Consequently, we believe that the appeals process will not affect the SIP submission requirements in the regional haze rule.

Question (8)(c): If your answers to (a) and (b) contemplate a different regional haze SIP submission date than expressed in the final rule. please indicate the impacts of the change on the regional planning undertaken by States to develop regional haze SIPs.

Response: As stated in the responses to (a) and (b) above, we do not contemplate regional haze SIP submission time frames different from those expressed in the final rule.

Question (8)(d): The Regulatory Impact Assessment (RIA) for the regional haze rule attributes most of the costs of reducing fine particulate emissions to the PM2.5 NAAQS, not to the regional haze rule. Given the uncertainty surrounding the PM2.5 NAAQS, do you plan to redo the regional haze RIA to attribute the costs of fine particulate reductions to this rule?

Response: The regional haze RIA was prepared for illustrative purposes. As the regional haze rule is final, we do not plan to redo the RIA.

Question (9)(a): What is the Agency's current schedule for completing the Tier 2/gasoline sulfur rulemaking?

Response: Our current schedule is to complete our rulemaking action by the end of 1999. Our belief is that completion by the end of 1999 will provide adequate leadtime for both the vehicle manufacturers and fuel suppliers to meet our new requirements. Furthermore, Section 202(i)(3)(A) of the Clean Air Act requires EPA to complete, by rulemaking, its determination concerning the need, feasibility and cost effectiveness of new standards - which is one of the components of our proposal - by December 31, 1999. Finally, since the heavy-light-duty-trucks affected by our proposal are considered heavy-duty vehicles under the Act, Section 202(a)(3)(C) requires that we provide a minimum of 4 years leadtime for any new standards affecting those vehicles. Thus, to implement new standards in 2004 for these vehicles, we must complete our rule by the end of 1999.

Question (9)(b): In light of the Court of Appeals decision and the multiple references throughout the Preamble and the Benefit-Cost Analysis to the new eight-hour ozone and the fine particulate matter standards, what steps is the Agency planning to take to revise the Preamble and the Benefit-Cost Analysis accompanying this rule? Will the public have the opportunity to comment on these revisions?

Response: As you know, we have published a clarification describing our understanding of the impact of the court decision on our Tier 2/gasoline sulfur proposal. As described in that notice, we believe that the need for our rule is clear even under the pre-existing l-hour standard. That revised Preamble discussion was made available specifically to provide public opportunity for comment, as suggested in your question.

The clarification also discusses our reasons why the court decision does not affect our evaluation of air quality and health/welfare impacts as presented in the benefit-cost analysis. This is discussed in more length below in response to your detailed questions in item (e). Briefly, the benefits to be expected from our rule are derived directly from the scientific literature, which is used to estimate the relationship between a given improvement in air quality levels and the resulting health and welfare benefits. In general, in its decision, the court did not

find fault with the scientific basis for EPA's determinations regarding adverse health effects from ozone or PM. Therefore, the Court decision does not affect the benefits analysis performed for the Tier 2 rule.

Question (9)(c): According to the Preamble for EPA's Notice of Proposed Rulemaking on Control of Air Pollution from New Motor Vehicles, "Without Tier 2 and gasoline sulfur controls. we project that in 2007 at least 8 metropolitan areas and 2 rural counties with a combined population of 39 million will exceed the l-hour ozone NAAQS and 28 metropolitan areas and 4 rural counties with a combined population of 80 million will exceed the 8-hour ozone NAAQS." Please quantify any differential in the stringency of the proposed Tier II or Low Sulfur standards associated with the differential in public health benefit associated with the old and the new ozone NAAQS.

Response: In our clarifying notice, we reiterated our proposed finding that there is a need for further reductions in emissions in order to attain or maintain the NAAQS, even when consideration is limited to the one-hour ozone NAAQS. We believe that no change in the proposed stringency of the Tier 2 or gasoline sulfur standards should be made, regardless of which ozone NAAQS is considered.

Question (9)(d): Please provide the Committee with documentation, including any studies performed or contracted for by EPA, that contain information which indicates that the proposed rule is justified under the existing standards.

Response: The information which we have indicating that the proposed rule is justified under the existing standards is discussed in our clarifying notice. That discussion is in the public record and available for review and comment. Furthermore, enclosed are copies of two documents placed in the public record at the time we published our notice. These documents ("Exceedance Method Analysis of Photochemical Modeling in Support of Tier 2/Sulfur" and "Guidance on Use of Modeled Results to Demonstrate Attainment of the Ozone NAAQS") provide more extended information on topics referenced in the notice. Additional information can also be found in the draft Regulatory Impact Analysis issued in conjunction with the proposal in May, 1999. A copy of this analysis has already been provided to the Committee.

Question (9)(e): On June 24. 1999, you made a clarification of the May 13, 1999 Notice of Proposed Rulemaking (NPRM) on 'Tier 2/gasoline sulfur standards. This clarification provided supplemental information on the NPRM along with a request for comment. On page 21 of this clarification, it is stated that the monetized benefit estimates for the Tier 2/gasoline sulfur proposal are not affected by the May 14th Court of Appeals decision and that "none of these pieces of the benefits analysis are dependent upon the specific level of the NAAQS." However, a review of the Benefit-Cost Analysis for the NPRM appears to indicate that mortality associated

with long term exposure to PM2.5 is calculated based on Pope et al. (1995). It is my understanding that this study is a long-term epidemiological analysis of the health impacts of PM2.5. Further, Table VII-1 6 of the Benefit-Cost Analysis appears to indicate that the Pope study results in monetary benefits between $2.3 and $14.3 billion. Therefore, please indicate how "none" of the benefits calculated for the NPRM are dependent on projected health endpoints associated with a reduction in PM2.5. If "none" of the benefits are calculated with referenced to the Pope study or PM2.5. on what basis are they calculated? Please provide any supporting studies, analyses or records which support such a calculation.

Response: The statement on page **21** of the supplemental notice issued on June 24, 1999 that "none of these pieces of the benefits analysis are dependent upon the specific level of the NAAQS" should not be taken to mean that the benefits are not associated with PM2.5 reductions. Rather, this language states that the methodological "pieces" used to estimate the benefits are based on scientific literature which is not dependent on the NAAQS. Benefits occur at any level of reduction, regardless of the stringency of the NAAQS. In determining the impact of emission reductions on air quality and various health and welfare endpoints, EPA relies solely on the underlying studies relating effects of changes in pollutant concentrations to endpoint changes (such as mortality). The Pope et al. study was conducted and peer reviewed independently from any process used to determine the level of the PM NAAQS. The study is used as a reference source to value benefits. The use of the scientific literature as the basis for the valuation of benefits is standard practice for conducting such analyses. EPA uses the Pope et al. study for any benefit analysis of environmental policy that results in PM2.5 reductions? even if the goal of the policy is not directly related to the reduction of fine particles.